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No. 82-2120.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

v.

WILLIAM P. ROBINSON, JR., RHODE ISLAND ASSOCIATE COMMISSIONER OF EDUCATION, ET AL.,
RESPONDENTS

Brief for Respondents.

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Questions Presented.

1. Plaintiffs may not evade the lack of a fee provision in the Education For All Handicapped Children Act (the "EAHCA") by simply alleging surplus and redundant constitutional claims and equivalent claims under § 504 of the Rehabilitation Act.

2. Fees may not be awarded against a hearing officer acting under the EAHCA.

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Facts of the Case.

The facts and travel of this case are adequately stated in the Court of Appeals decision in this matter. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). (Copy of Decision to be found as Appendix A to the Certiorary Petition, A. 1-21.)

Argument.

I. Petitioners are Not Entitled to Attorney Fees Simply because they Alleged Surplus "Constitutional Claims" in their Complaint.

Petitioners have conceded, for purposes of this case, that the EAHCA is not enforceable through 42 U.S.C. § 1983. In the light of this Court's prior ruling in *Middlesex Cty. Sewerage Auth.* v. *Sea Clammers*, 453 U.S. 1 (1981) and the guidance contained in *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981) they had little choice but to make this concession. *Middlesex County* holds that when a comprehensive remedy is provided in a Federal statute an action under 42 U.S.C. § 1983 does not lie, and that the statute may only be enforced through the remedy explicitly provided by Congress. Since petitioners do not contend that the EAHCA is enforceable under 42 U.S.C. § 1983, this issue need not be discussed at length here. Still respondents note that the EAHCA is a paradigm case of a Federal statute which may not be enforced through 42 U.S.C. § 1983. An article entitled "Section 1983 and the Private Enforcement of Federal Law" states:

> *Statutes That Create Independent Private Causes of Action Against State Officials.* As suggested above, a private remedy under section 1983 should usually be denied when Congress has created an express private cause of action against state officials in the governing substantive statute. If the private cause of action in that statute is substantially identical to the section 1983 remedy, the section 1983 remedy should be presumed to have been supplanted; if a different presumption were indulged, the statutory remedy would be redundant. If, on the other hand, the two are materially different, the statutory

remedy should also be presumed to be exclusive. Use of the section 1983 remedy would effectively nullify the conditions imposed on the later remedy.

The first several cases to pose the issue since *Thiboutot* have relied on this reasoning. In *Sea Clammers*, the plaintiffs, alleging that discharges and ocean dumping of sewage had unlawfully damaged fishing grounds, claimed a private right of action under the Federal Water Pollution Control Act ("FWPCA"), the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), federal common law, and on other grounds. Although none of the parties had invoked section 1983, the Court raised and disposed of it in a single paragraph. The existence of a comprehensive remedial scheme, the Court said, may demonstrate a congressional intent to preclude a cause of action under section 1983. Because the statutes did "provide quite comprehensive enforcement mechanisms," the Court doubted "that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions." The Court so concluded even though broad savings clauses appeared to compel a contrary conclusion.

Lower courts have used similar reasoning in finding the section 1983 action preempted by express private causes of action in the substantive statute at issue. They have also found that implied causes of action preempt section 1983 — an equally persuasive result if the implication of the private right of action is justified.

49 University of Chicago Law Review, 394, 427-428 (1982). The above-quoted language is supported by citations to cases such as *Anderson* v. *Thompson*, 658 F.2d 1205, 1214-1217 (7th Cir. 1981).

Since petitioners do not contend that the EAHCA is enforceable through § 1983, the only question in this case is whether the petitioners will be allowed to evade the lack of an attorneys' fees provision in the EAHCA by resorting to a pleading trick. Petitioners contend that in their complaint they alleged a constitutional claim under § 1983 and a claim under § 504 of the Rehabilitation Act. They contend that under the rationale of *Maher* v. *Gagne*, 448 U.S. 122 (1980), they should be entitled to an award of fees on the basis of these concededly unaddressed claims. The problem is that the so-called constitutional claim is nothing but a simulacrum of the EAHCA, and that claim under § 504 of the Rehabilitation Act is nothing but a spectral avatar of the very same EAHCA claim. Petitioners are simply attempting to do indirectly what they can't do directly. Following the necessary logic of *Middlesex County, supra*, the Court of Appeals in this case put it this way:

> This principle precludes section 1988 fees for the constitutional claims at issue here. The fact that the section 1983 claims alleged here are based upon independent constitutional violations rather than violations of the EAHCA itself is immaterial. The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and constitutional claims is that the former carries with it a far

more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. Cf. *Scruggs* v. *Campbell*, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely by reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. *See Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds*, 130 U.Pa.L. Rev. 488, 518 (1981).

This is not to say that the EAHCA in any way limits the substantive scope of a handicapped child's constitutional rights. Should a handicapped child have a constitutional claim that is not provided for by the EAHCA, section 1983, and therefore section 1988 might be available. We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply.

Smith v. *Cumberland School Committee*, 703 F.2d 4, 8-9 (1st Cir. 1983). In sum petitioners should not be permitted to do indirectly what they can't do directly by alleging a sham constitutional claim.

II. Petitioners "Constitutional Claims" Were at All Times "Moot."

Respondents note here that the EAHCA was enacted under the spending clause (*Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982)) and that this Court has repeatedly held that statutes enacted under the spending clause are the supreme law of the land in states which participate in such programs. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 2 (1981). It is thus apparent, that in states which participate in the EAHCA, constitutional claims, not themselves going beyond the explicit terms of the Federal EAHCA, cannot arise. Such claims are not "substantial" or "insubstantial" — they are moot, hypothetical, and unreal. No question *on the merits* turns on their resolution. There is also here a confluence between the concept of "arising under" and the concept of mootness. In *Bell* v. *Hood*, 327 U.S. 678, 685 (1946), this Court stated that a case arises under Federal law when:

> the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U.S. 109, 112, 113; *Smith* v. *Kansas City Title Co.*, 255 U.S. 180, 199-200.

In the case at hand nothing, not even jurisdiction (already present under the EAHCA), turns on the resolution of peti-

tioner's constitutional claims.[1] *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) established that constitutional questions should only be examined as a last resort.

If there is to be a rule that constitutional questions should not be considered except as a last resort, then such a rule should be a consistent one. In some circumstances the *necessity* to determine jurisdiction *forces* courts to make a ruling on whether a question is substantial or insubstantial. Federal courts are under a duty to assume jurisdiction when jurisdiction exists. In the case at hand petitioners are contending that such a determination should also be made solely for the purpose of deciding whether or not an attorney fee should be paid. In *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) this Court stated: "Where a case in this court can be decided without reference to questions arising under

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[1] As Justice Cardozo stated in *Gully* v. *First Nat. Bank*, 299 U.S. 109, 112 (1936): "How and when a case arises under the Constitution or laws of the United States has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and *an essential one*, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U.S. 248, 257; *First National Bank* v. *Williams*, 252 U.S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid*; *King County* v. *Seattle School District*, 263 U.S. 361, 363, 364. A *genuine* and *present controversy*, not merely a *possible* or *conjectural one*, must exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U.S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U.S. 184, 191; *Joy* v. *St. Louis*, 201 U.S. 332; *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133; and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (*Tennessee* v. *Union & Planters Bank*, 152 U.S. 454, *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25; *Taylor* v. *Anderson*, 234 U.S. 74). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U.S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, *supra*." (Emphasis added.)

the Federal Constitution, that course is usually pursued and is not departed from without important reasons." The rule enunciated in *Siler* will be best served by allowing its logic full play. In the absence of a need to determine jurisdiction, constitutional claims, which can have no effect on the outcome of the case, should not be examined at all. When jurisdiction is at issue, consideration of such claims does not present issues of mootness. Something — jurisdiction — hinges on the question of whether the claim is substantial or insubstantial.

A rule forbidding courts, in cases such as the one at bar, from ruling on the "substantiality" of Federal claims, not needed to establish jurisdiction, prevents courts from passing judgment needlessly on some constitutional claims and labeling them insubstantial. It also spares courts the embarrassment of ruling that a claim is bad on the merits (perhaps the result of a Court of Appeals precedent) but still substantial enough to support an award of attorney fees. The alternative would be to hold that parties should be allowed to litigate constitutional claims solely to determine the question of attorney fees. Such a ruling would not only subvert *Siler*, but also the consistent ruling of this court (special cases such as *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326 (1980) notwithstanding) that the issue of costs does not save a case from being moot. *Heitmuller* v. *Stokes*, 256 U.S. 359 (1921); *Ward* v. *Arkansas State Police*, 493 F. Supp. 1315, 1328 (E.D. Ark. 1980), *rev'd on other grounds*, 653 F.2d 346, (8th Cir. 1981); *Cramer* v. *Virginia Commonwealth University*, 486 F. Supp. 187, 192 n.7 (E.D. Va. 1980).

III. Plaintiff Never Presented a Substantial Constitutional Question.

A reading of the EAHCA will show that it is a compendious grant of substantive and procedural rights. 20 U.S.C. §§ 1401-

1461. If plaintiffs are contending that because they did not get initially what they wanted under the EAHCA, they were denied equal protection, they have failed to state a substantial Federal question. *Snowden* v. *Hughes*, 321 U.S. 1 (1944). As the First Circuit Court of Appeals stated in *Creative Environments, Inc.* v. *Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982):

> *Every* appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." *Crocker* v. *Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam). *See also Paul* v. *Davis*, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160, 47 L.Ed. 2d 405 (1976) *quoting Screws* v. *United States*, 325 U.S. 91, 108-09, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden* v. *Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944) ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."). *Cf. Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed. 2d 271 (1981) (no cause of action stated under section 1983 for claims related to discriminatory administration of state tax system). In short, we

> see nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. CEI may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court.

Although the EAHCA is a Federal Act, this case, and the cases just discussed above, are entirely analogous. Simply because a benefit has been denied under a statute does not result in a violation of due process and equal protection.

Petitioner cannot also be arguing that Rhode Island law excluded emotionally handicapped children from an education. At all relevant times Rhode Island law on the subject was as follows:

> 16-24-1. *Duty of school committee to provide special education.* — In any city or town where there is a child within the age range as designated by the regulations of the state board of regents for education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of regents for education in accordance with its regulations.

This case developed from the fact that the state laws also created a program entitled "Services for Emotionally Dis-

turbed Children." Rhode Island General Laws, 40.1-7-1, et seq.[2]

The School Committee made the mistaken decision that this program ("Services For Emotionally Disturbed Children"), rather than the School Committee itself, was responsible for educating Thomas Smith (J.A. 66). When this decision was appealed to the Commissioner of Education, he ruled mistakenly that the School Committee was right (J.A. 77, Opinion dated April 17, 1978). He stated:

> Thus, it is our opinion that, pursuant to the provisions of § 40.1-7, it is the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the "per pupil cost" as its share of the cost of the educational and related services provided to Thomas.

The ultimate decision by the Rhode Island Supreme Court was that the School Committee rather than "Services For Emotionally Disturbed Children" was responsible for the education of

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[2] The portion of law which caused the confusion reads as follows:

> 40.1-7-4. *Definition.* — Whenever used in this chapter, or in any order, rule or regulation made or promulgated pursuant to this chapter, or in the printed forms prepared by the department or the director, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, the term:
>
> 1. "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

emotionally handicapped children. *Smith* v. *Cumberland School Committee, supra* (J.A. 129). None of this, of course, constitutes a denial of due process or equal protection. *Creative Environments, Inc.* v. *Estabrook, supra.*

IV. The Commissioner of Education was Acting in a Judicial Capacity in This Matter.

It cannot be disputed that the Commissioner of Education was acting in a judicial capacity in this case (see J.A. 77, Decision dated April 17, 1978 by the State Commissioner of Education). His only contact with the matter was to hear a case appealed to him under the EAHCA. Of course, judicial officers, acting in a judicial capacity, possess absolute judicial immunity. *Slotnick* v. *Garfinkle*, 632 F.2d 163 (1st Cir. 1980). This immunity includes those who, while not strictly judges, are acting in a judicial capacity. *Sellars* v. *Procunier*, 641 F.2d 1295 (9th Cir. 1981).

In *Supreme Court of Va.* v. *Consumers Union*, 446 U.S. 719 (1980), the United States Supreme Court stated that it had not yet decided whether judicial officers are subject to prospective relief. It has, therefore, not had occasion to rule whether attorney fees may be awarded against judges. However, in *Supreme Court of Va.* v. *Consumers Union, supra*, the court did state that if the Virginia Supreme Court had been acting in a purely legislative capacity, which possesses a corresponding immunity, attorney fees would not have been awardable. Since the United States Supreme Court apparently found that the Virginia Supreme Court had acted in an enforcement capacity in the particular case, an award of attorney fees was ultimately granted. *Consumers Union of U.S.* v. *Virginia State Bar*, 688 F.2d 218 (4th Cir. 1982).

Respondents submit that the law is that attorney fees should not be *awardable* against administrative officials acting in a judicial capacity. If such fees were to be *awardable* either against the official or the public agency which employs him, there will be created in the official just such an interest in the cases which are brought before him as is forbidden by the Constitution. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

Ward, supra, held that due process is violated when a judge has an institutional interest in the fines which he imposes. the case at bar is just the same, except that it would involve a loss of funds rather than a gain. Thus, attorney fees should not be awardable against those acting in a judicial capacity.

Respondents submit that a bizarre situation will be created if attorney fees are awardable in a case of this nature. Surely there are no grounds for holding that hearing officers, acting under the EAHCA are liable for attorney fees, under § 1983 and § 1988, simply because the Federal court holds that such a hearing officer made a wrong decision. That is all that happened in this case (see J.A. 189, Order of June 3, 1981). If fees are available under these circumstances, then district court judges and judges of the courts of appeal could, under the rationale of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) be held liable for attorney fees when they are reversed.

An Action Under § 1983 was Not Available in This Case.

When both the State and Federal government agree, under the spending clause, to jointly create substantive rights and concomitant procedural protections, the rationale of *Monroe* v. *Pape*, 365 U.S. 167 (1961) ceases, if respectfully submitted, to be applicable. In *Monroe*, this court held that a cause of action arose under § 1983 in spite of the fact that state law and

adequate state procedure were also available to vindicate the same right which was the subject of the Federal action. In the case at bar, however, the State and Federal government have joined together, under the spending clause, to create substantive and procedural rights. In *Ingraham* v. *Wright*, 430 U.S. 651 (1977) this Court held that ". . . common-law safeguards that already exist" can provide adequate protection for a constitutional right, and that no procedural due process claim could, therefore, arise under the constitution, to be vindicated under § 1983. It is submitted that the procedural due process rights granted under the EAHCA are more than sufficient to vindicate whatever constitutionally protected rights are present in a case of this nature. This court should hold that the procedural rights under the EAHCA, have the same effect as the common-law had in *Ingraham*, *supra*, and that a constitutional cause of action, therefore, did not arise.

V. Petitioners Prevailed in an Action to Enforce the EAHCA Not in an Action under § 1983.

In any event the enabling act of the Federal Rules of Civil Procedure makes it plain that no power is granted to abridge substantive rules of law. 28 U.S.C. § 2072. While the rules may establish "one form of action" it is submitted that in order to be entitled to attorney fees under § 1988 which applies in "any action or proceeding to enforce . . ." a claim for which § 1983 creates a remedy ("shall be liable . . . in an *action at law*, suit in equity, or other proper proceeding . . .") one must prevail either in an action to enforce § 1983 or a claim pendent to an action to enforce § 1983. Here petitioners' § 1983 action is surplus to petitioners' EAHCA action, under 20 U.S.C. § 1415. If petitioners prevailed at all, they prevailed in an action to enforce the EAHCA. They did not prevail in an action to enforce § 1983 or in a claim pendent to a § 1983 action.

A reading of *Aldinger* v. *Howard*, 427 U.S. 1 (1976) will show that there is a distinction between a *cause of action* under § 1983 and the general civil action (the "one constitutional 'case'" defined in *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)) over which the District Court presides. A valid distinction exists here.[3] *Davis* v. *Passman*, 442 U.S. 228, at 236 (1979).

VI. In this Case, Fees are Not Available under the Rehabilitation Act.

Fees are not available under the Rehabilitation Act here for substantially the same reasons that they are not available under § 1983 and § 1988. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). In addition, this court has held that § 504 of the Rehabilitation Act does not require recipients to make substantial modifications in programs. *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). Private school placement (the issue in this case) is the sort of affirmative action that is not required under the Rehabilitation Act. *Colin K. By John K.* v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983). Plaintiffs, therefore, failed to state a claim under § 504 at all.

It should also be noted that this court has reserved the question of whether a private right of action exists under § 504. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). In *Maher* v. *Gagne*, *supra*, this court also reserved the ques-

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[3] The general reasoning of *Aldinger* survived *Monell* v. *New York City Depart. of Social Services*, 436 U.S. 658 at 701 n.66. *Aldinger*, of course, is not cited here for any reason to or with "pendent parties" but only to show that § 1983 actions are distinct "causes of action" which are separate from "the form of action" described in Fed.R.Civ.P. 2.

tion of whether claims not falling under the rubric of the Fourteenth Amendment can ever suffice to breach a state's Eleventh Amendment immunity and thus provide a basis for an award of attorney fees. *Maher* v. *Gagne*, *supra* at 130. Although there is dicta to the effect that fees are part of costs, and thus not subject to Eleventh Amendment immunity, a reading of the applicable cases (*i.e.*, *Hutto* v. *Finney*, 437 U.S. 678 (1978)) will show that this issue has not yet been decided.

Respondents submit that if the court should reach these questions that a private right of action, given the availability of administrative relief, should not be implied under § 504. Even if an implied remedy exists, respondents urge that the Eleventh Amendment bans an award of attorney fees in claims not arising from the Fourteenth Amendment since attorney fees are not properly "costs" of an action.

Respondents also submit that such issues should not be considered here at all. The fact that such issues are sought to be raised here demonstrates the inherent vice of the petitioner's contention that this Court, or any court, should consider such moot issues for the sole purpose of determining the availability of attorney fees. If this Court is to rule on the existence of a private cause of action under § 504, it should do so in a case where the resolution of the question goes to the merits of the case rather than to the availability of attorney fees. To do so would simply constitute an abuse of the discretion available under § 505(h) of the Rehabilitation Act.

Conclusion.

Petitioners are not entitled to an award of attorney fees in the case at bar.

Respectfully submitted,

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